APR 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 982

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

Petition For Writ of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit and Brief in Support Thereof.

BURNETT WOLFSON,
711 Citizens National Bank Building, Los Angeles,
Counsel for Petitioner.

JOHN P. TOBIN,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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A farmer-debtor who has secured a confirmation of a composition and/or extension plan and is "aggrieved" by it must amend under subdivision (s) within a reasonable time; an amendment filed 33 months after date and but 3 months before date of expiration of plan was not filed within a reasonable time; one who accepts benefits of composition and/or extension plan for 33 months and who repeatedly during that 33-month period proclaimed that plan as confirmed, and, as modified, provided financial rehabilitation is estopped from being "aggrieved"..... 26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. M. Cohan, respectfully shows:

I.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 [R. 98-103], and is not yet reported in the Federal Reporter. A prior opinion on a former appeal in the same case, but on a different question, was rendered on June 7,

1940, and is reported in 112 Federal (2d) 967. Latter is not concerned directly in this petition for Writ of Certiorari.

II.

Jurisdiction.

The final judgment of the Court below was filed on March 26, 1941 [R. 98-103], and this petition is filed within three months thereafter.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stats. 938; 28 U. S. C. Sec. 347).

III.

Statement of Facts.

(Throughout the following statement of facts; Petition and Brief in support of this Petition, your petitioner is designated as creditor or secured creditor and respondents are designated as debtors.)

In 1931 this creditor sold to these debtors a twenty-acre citrus grove, seventeen acres planted to lemons and three acres planted to Valencia oranges, located in Los Angeles County, State of California. There was a cash payment of $5000 and a transfer of a mountain cabin at the allowed value of $2000.00, to apply on the purchase price. Debtors assumed a deed of trust on said property in the sum of $15,000.00 and the seller took from the buyers (debtors) an amortized second deed of trust on said property in the sum of $20,500.00, interest at the rate of 7%, together with an unsecured note for $10,000.00. The note for $10,000.00 was finally paid by the debtors after this creditor was forced to retain an attorney for

said purpose. Subsequently, the note for $20,500.00, secured by the deed of trust, changed hands several times, but is now back with the original holder. Therefore, all proceedings relative to the $20,500.00 deed of trust are given in the name of this creditor for the purpose of clarity.

In 1933 and 1934 these debtors were unable to meet the obligations and conditions of the first and second deeds of trust on the grove and were delinquent in their taxes for same. The holder of the first deed of trust intended to execute on the deed of trust held by him because of the defaults of these debtors in 1933 and 1934. Thereupon, on February 1, 1934, this creditor arranged a tri-party agreement between the holders of the two deeds of trust and the debtors whereby the holder of the first deed of trust agreed in writing not to foreclose upon the debtors upon the postponement of certain rights of this creditor. During the period from February 1, 1934, to September 27, 1938, there was not one cent of interest paid to this creditor upon his sizable investment. From 1934 to 1937 there was nothing paid on principal, either. The first deed of trust was paid off late in 1936. During the period of January, 1937, to September, 1937, this creditor received some $600 on principal in accordance with a recorded crop sharing agreement with the debtors that was abrogated by the confirmed plan.

In January, 1937, debtors were unable to pay anything on our deed of trust and late that month a freeze destroyed most of the crop on the grove and injured many of the trees. It was evident that debtors would be unable to meet any of their obligations under said deed of trust, as their only source of income was that received from the aforementioned grove, commonly described throughout

these proceedings as the "lemon grove" and another twenty (20) acre grove, planted to oranges, located in Los Angeles County also, and commonly described in these proceedings as the "orange grove." On the orange grove there were several deeds of trust securing large indebtedness', too. The trustee of our deed of trust, First National Bank of Pomona, was given notice in February, 1937, of the recordation of default and instructed to proceed with a sale of the security in accord with the provisions of the law of California thereon. This creditor has a lien on but one of the two groves standing in names of debtors. Our lien is on the so-called "lemon grove" only.

On May 11, 1937, 88 days after notice of default, debtors filed their petition, No. Pomo-C-181, in the Superior Court of the State of California in and for the County of Los Angeles, through their attorney, Allan J. Carter, Esq., seeking relief under the California Moratorium Act. The matter was subsequently dismissed upon motion of this creditor by the Honorable Frank Swain, Judge. However, before granting the dismissal the Court had heard all of the evidence proffered by petitioners.

On August 14, 1939, the trustee of said deed of trust was to hold a sale of said property. On August 13, 1939, debtors filed their petitions in the United States District Court, Southern District of California, seeking relief under the provisions of Section 75 of the National Bankruptcy Act, thus prohibiting a sale by the trustee. Hearings were subsequently had before Hon. Oregon Smith, Conciliation Commissioner, at which time debtors proffered their original proposal, which was refused by this creditor. When the original proposal was refused by this creditor, his attorneys journeyed from Los Angeles to Pomona to consult with debtors' attorneys in an effort to secure a fair proposal. Debtors then filed their amended proposal, which

was also refused by this creditor. Thereupon, the Conciliation Commissioner, Hon. Oregon Smith, instructed debtors to proceed under subdivision (s) of Section 75. However, several days later, a new hearing was ordered by a Supervising Conciliation Commissioner, and the new hearing was held by Hon. C. P. Von Herzen, at which time the second amended proposal was presented [R. 13] over the objections of this creditor. This second amended proposal was confirmed by the Honorable H. A. Hollzer, District Judge [R. 24], over the strenuous objections of this creditor. Under the terms of said proposal the District Court retained jurisdiction for the purpose of supervision and control for three years [R. 13].

Under the terms of the confirmed proposal, all taxes, living expenses of debtors, operation expenses of properties, etc., were to be paid before any money was paid to a creditor. Interest was to be paid this creditor at the reduced rate of 6%, payable annually the first year, semi-annually thereafter, and $1647.00 was to be paid on principal amount on March 27, 1939; $2000.00 on September 27, 1939; $2500.00 on March 27, 1940, with balance on September 27, 1940 [R. 14]. The other debts and their method of payment are set forth in the plan [R. 13-17].

On September 27, 1938, this creditor received one year's interest at the reduced rate. On March 27, 1939, debtors were unable to pay principal or interest due under plan. There was filed by this creditor a motion to dissolve the restraining orders prohibiting a sale under the deed of trust held by him on March 31, 1939, and a motion to dismiss the proceedings and to vacate the order of confirmation was also filed [R. 31]. On April 6, 1939, debtors filed a petition to postpone the payment of principal sum of $1647.00 and interest, due under the plan, for 90 days [R. 25] and on same day filed their petition

to reduce rate of interest payable to all creditors to 3½%. The matters were heard by the District Court on April 10, 1939, and this creditor showed that it was impossible for debtors to make such payment in 90 days. Debtors then asked leave of Court to amend their petition asking for extension of the payment of the principal sum of $1647.00 and the Court granted leave to amend the petition which sought extension for 90 days for the payment of the principal sum of $1647.00 and interest. The debtors filed their amended petition on April 13, 1939, and said amended petition not only sought to extend the payment of the $1647.00 amount, but incorporated the principal payment of $2000.00 which was due in September, 1939 [R. 35]. In the hearing of April 10, 1939, certain questions were referred to the Conciliation Commissioner for report and the report was returned to the Court on May 9, 1939. The report disclosed that the taxes on the property on which we held the deed of trust were unpaid and said taxes were still unpaid on July 15, 1940; living expenses of debtors were unpaid; Conciliation Commissioner's fees of administration unpaid; current operation expenses of over $2400.00 unpaid, and said report did not include the operation figure of $274.93. The report further showed that most of the principal and interest items due under the plan were unpaid and that debtors were behind over $8500.00 on their plan, as well as incurring additional thousands of dollars of new debts.

The decree granting petition for reduction of interest payable to all creditors, secured and unsecured, to 3½% and granting the amended petition for postponement of the two principal payments due this creditor and denying the two motions of this creditor was signed and filed on September 28, 1939 [R. 45].

From said decree of September 28, 1939, this creditor filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, same being No. 9377 and the decree of the District Court was affirmed in the decision rendered June 7, 1940, and reported in 112 Fed. (2d) 967.

The foregoing constitutes a statement of the factual situation up to and preceding the matters immediately pertinent to the questions decided in the decision which is the basis of this petition.

Under the confirmed plan, as amended, and as approved on appeal, these debtors were required to pay this creditor $2500.00 on March 27, 1930, together with interest at the reduced rate [R. 13 and R. 45]. When debtors and Conciliation Commissioner refused to perform in accord with the plan, as amended, this creditor filed the petition for leave to sell [R. 66] and motion to vacate restraining orders [R. 48]. These were filed on July 2, 1940, and were set for hearing on July 8, 1940. Three days later debtors filed their amended petitions for leave to go under subdivision (s) [R. 52-56], together with recommendations of the Conciliation Commissioner. The minute order of adjudication was stamped with the name of the Honorable Geo. Cosgrave, Judge, on July 5,1940 [R. 60]. It is the practice in the aforesaid District Court to present said amended petitions for filing and the clerk thereupon affixes the stamp of the judge thereon. No creditor was apprised of the filing of said amended petitions by either the debtors or the Conciliation Commissioner, notwithstanding the fact that this creditor had served upon them copies of the aforesaid motions.

Thereafter this creditor filed the motion to dismiss [R. 69] on July 10, 1940, and the motion to set aside the

orders permitting debtors to go under subdivision (s) [R. 70] and secured a temporary restraining order and order to show cause on July 11, 1940. Said latter was to prevent the exercise of the rights of subdivision (s) until further order of Court. These last motions were set for July 15, 1940, the previous motions having been continued until said date. On July 15, 1940, this creditor presented argument on said motions and debtors replied. The Conciliation Commissioner did not participate in the argument, albeit in court [R. 76]. Nowhere or no time were any of the facts alleged in the affidavits in support of this creditors' various motions, etc., denied by debtors or Conciliation Commissioner either by counter-affidavit or otherwise. At the conclusion of the hearing this creditor was permitted [R. 77] to present the testimony of two appraisers out of order for the purpose of saving this creditor additional appearance fees, that being their second day in court waiting to testify. These appraisers were O. A. Nickerson and Charles A. Trowbridge and each testified that the value of the lemon grove, security for our deed of trust, was under $20,000.00, same being under our lien amount. All of the record presented in the District Court on the matter is now before this Court. The District Court ordered the matter submitted on briefs and on August 6, 1940, made its order denying the motion of this creditor to set aside the orders permitting debtors to go under subdivision (s) and to strike same from the files, together with the recommendations of the Conciliation Commissioner [R. 78].

From the order denying this creditor's motion, appeal was taken to the United States Circuit Court of Appeals (9th Circuit) and said Court affirmed the order of the District Court [R. 104]. Thereupon this petition.

III (A).

Summarization of the Facts.

1. Feb., 1931, creditor sells 20 acre citrus grove to debtors, taking back an amortized deed of trust secured by said grove [R. 4];

2. Feb., 1937, creditor files declaration of default under deed of trust, not having received a single penny on interest or principal during period 1934-1937 [R. 5];

3. May, 1937, debtors file for relief under California Moratorium Act [R. 5];

4. July, 1937, debtors denied relief under California Moratorium Act; petition dismissed by Superior Court of California [R. 5];

5. July 13, 1937, debtors filed under Section 75 of Bankruptcy Act, one day before date of sale under deed of trust [R. 18];

6. Sept. 27, 1937, debtors secure approval of their second amended composition and/or extension plan under subs. (a) to (r) of Section 75; confirmed by District Court [R. 18];

7. Debtors fail to pay taxes, operation expenses of grove, interest and principal sums due under plan during period of Sept., 1937-March, 1939 [R. 31];

8. March, 1939, creditor moves to dismiss and petitions for leave to sell because of facts in No. 7, hereof [R. 31];

9. April, 1939, debtors petition for modification of plan [R. 29, 35];

10. Sept., 1939, petition seeking modification of confirmed plan granted and creditor's motions denied [R. 45];

11. Oct., 1939, creditor appeals from No. 10 to Circuit Court [R. 9];

12. June, 1940, Circuit Court (9th) affirms decree of modification;

13. July 1, 1940, creditor petitions for leave to sell, etc. [R. 48];

14. July 5, 1940, debtors file amendment under (s) when plan was in operation for approximately 33 months and had but three months more to continue [R. 56]; taxes, operation expenses, interest and principal payments unpaid;

15. July 11, 1940, creditor files motion to vacate adjudication [R. 70];

16. August 6, 1940, District Court denies motion to vacate order of adjudication [R. 78];

17. Sept., 1940, creditor appeals to Circuit Court (9th) from order denying motion to vacate adjudication [R. 79];

18. March 26, 1941, Circuit Court (9th) affirms District Court Order [R. 98].

IV.

Questions Presented.

1. Has a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act, the right to amend under sub. (s), thereof, after securing the consent of a majority in number and amount of creditors and after District Court has confirmed plan?

2. Has a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act the right to amend under sub. (s), thereof, a confirmed plan thirty-three months after presentation, and, particularly, when said confirmed plan was for a period of thirty-six months?

3. Does not sub. (l) of Section 75 of the Bankruptcy Act provide the full relief intended by Congress for a debtor that has secured confirmation by the District Court of his own plan which he had approved by a majority in number and amount of his creditors?

4. (a) Is it not the duty of a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act, to file leave to amend under sub. (s), assuming for the purpose of this question the validity of No. 1, hereof, within a reasonable time after confirmation of a composition and/or extension plan?

4. (b) Has a District Court the right to allow an amendment under sub. (s) of Section 75 of a composition and extension plan that had but three months to live, it being thirty-three months after presentation of a thirty-six month plan?

5. Can a debtor under Section 75 be aggrieved by his own act of securing confirmation of his plan and operating under it for a period of thirty-three months? And, particularly, can said debtor claim to be aggrieved after lapse of thirty-three months when during said period he accepted benefits thereunder and repeatedly proclaimed that confirmed plan, and, as amended, provided rehabilitation?

V.

Reasons Why the Writ Should Be Granted.

I.

In holding that a debtor under Section 75, subs. (a) to (r), who had his own composition and extension plan confirmed, and later modified at his own request, may amend under the provisions of sub. (s) of said statute, the Court below has decided an important question of Federal law and an important question of jurisdiction of a District Court which has not yet been, but which should be settled by this Court.

II.

In holding that a debtor under Section 75, subs. (a) to (r), who had his own composition and extension plan confirmed, and later modified at his own request, may amend under the provisions of sub. (s) of said statute, thirty-three months after presentation and when the confirmed plan has but a three month period of life remaining, the Court below has decided an important question of Federal law and an important question of jurisdiction of a District Court which has not yet been decided, but which should be settled by this Court.

III.

In holding that a debtor under Section 75, subs. (a) to (r), may amend at any time to secure a further three-year extension under sub. (s) and need not do so within a reasonable time after confirmation of his plan, the Court below has decided an important question of Federal law and Federal procedure which has not yet been decided, but which should be settled by this Court, particularly, since it is the established rule that when a statute does not specify a time limit in which an act permitted therein may be done, a reasonable time is presumed to have been intended.

IV.

In holding that a debtor has the right to amend under sub. (s) at any time, notwithstanding that such amendment comes when his plan has but three months to live under subs. (a) to (r), it appears that the Court below has, we respectfully submit, approved of a procedure which could ultimately divest Courts of authority for the reason that the Act, subs. (a) to (r), requires confirmation by the District Court and requires action by the District Court for modification of the approved plan (sub. (l)) and all this could be cast aside by a debtor-litigant by a mere amendment on his part at any stage of the procedure and indirectly makes a travesty of the former proceedings and tends to destroy confidence in the integrity of legal procedure. This type of procedure, we respectfully submit, is foreign to law and justice.

V.

In holding that paragraph 3 of sub. (s) of Section 75, which does not refer to compositions or extensions, supersedes and overrides sub. 5 of 11 U.S.C.A., Section 32 (c), which prohibits a discharge where a composition plan has been confirmed within last six years, the Court below has decided an important question of Federal law which has not yet been decided, but which should be settled by this Court.

VI.

In holding that a debtor may amend under sub. (s) without giving notice, the Court below has approved of a procedure which is a denial of due process of law and which procedure has not yet been decided, but which should be settled by this Court.

VII.

Many of the compositions and/or extensions confirmed under the provisions of Section 75, subs. (a) to (r), are now expiring and this case presents a timely opportunity for this Court to indicate whether the debtors in such proceedings may amend just before expiration of their confirmed plan and secure a further three-year extension beyond that which they originally sought. This is the first case decided by a Circuit Court on this question and action taken now will avoid confusion and conflicting interpretations in the various Circuit Courts of Appeals. The Circuit Court of Appeals for the 7th Circuit on March 15, 1941, held that a debtor must amend under (s) within a

reasonable time after failing to secure a composition with creditors; said latter decision is in conflict with the decision which is the basis for this Petition in so far as the question of reasonable time is concerned. Therefore, this Court should resolve that conflict.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9663, J. M. Cohan, Appellant, vs. Charles Samuel Elder and Mary Ethel Elder, Appellees," and that the judgment of said Court therein be reversed by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem proper and just.

Dated: April 22, 1941.

BURNETT WOLFSON,
Counsel for Petitioner.

JOHN P. TOBIN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 [R. 98-103] and is not yet reported in the Federal Reporter. A previous opinion on a former appeal was rendered on June 7, 1940 and is reported in 112 Fed. (2d) 967; it is on a question not directly pertinent to this Petition.

II.

Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925. (43 Stat. 938; 28 U.S.C.A., Sec. 347.)

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying Petition for Writ of Certiorari and, in the interest of brevity, are not herein repeated. Any necessary elaboration will be made in the argument which follows.

IV.

Statutes Involved.

The statute herein involved is Section 75 (a) to (s) of the Bankruptcy Act, as amended; 49 Stat. 942; 11 U.S. C.A., Section 203 (a) to (s).

V.

Specification of Errors.

The United States Circuit Court of Appeals for the Ninth Circuit erred in each of the following:

1. In failing to hold that the District Court was without jurisdiction to permit a debtor, who had his own composition and extension plan of thirty-six months approved by a majority in number and amount of his creditors and confirmed by the Court, and later modified at his own request, to claim to be "aggrieved" within the provisions of sub. (s), and secure a further three year extension thereby;

2. In failing to hold that a debtor cannot be "aggrieved" by his own act in securing confirmation of his composition and extension plan;

3. In failing to hold that the District Court was without jurisdiction to permit a debtor, who had his own plan of composition and extension of thirty-six months approved by a majority in number and amount of his creditors and confirmed by the Court, and later modified, to accept the benefits of the plan under subs. (a) to (r) for thirty-three months of the thirty-six months period and then claim to be "aggrieved", and amend under sub. (s), particularly, when the plan had but three months to live;

4. In failing to hold that once a debtor secures a confirmation of a plan he cannot secure a discharge and that proceedings under sub. (s) would then amount to a federal moratorium. And that if a debtor is permitted to amend under sub. (s) after operating under subs. (a) to (r) for thirty-three months of a plan for thirty-six months, said statute permitting same is repugnant to the 5th Amendment of the Constitution in that it is arbitrary, unreasonable and confiscatory and constitutes a denial of due process of law;

5. In failing to hold that it constituted a denial of due process of law to allow an amendment without notice to parties affected adversely thereby; and,

6. In failing to reverse the order of the District Court.

ARGUMENT.

I.

A Farmer-Debtor Who Secured the Approval of a Majority in Number and Amount of His Creditors to His Composition and/or Extension Plan and Who Had It Confirmed by the District Court Cannot Claim to Be "Aggrieved" Thereafter, and, in That Manner, Secure a Further Three Year Extension; One Cannot Be "Aggrieved" by His Own Acts; Subsection (l) of Section 75 Provides the Full Relief Intended by Congress for a Farmer-Debtor Upon Confirmation of a Plan.

The record before this Court conclusively establishes that the debtors herein had their second amended composition and/or extension plan under subs. (a) to (r) approved by a majority in number and amount of their creditors on September 27, 1937 [R. 13-17]. The plan was confirmed by the District Court [R. 24]. Eighteen months thereafter, namely, March, 1939, debtors petitioned to modify their plan as confirmed [R. 35] and this was granted [R. 45]. It is undeniable that the various plans and modifications presented by the debtors, including the one approved and confirmed, were all presented by the debtors of their own volition.

It is submitted that the provision relating to amendments[1] is unequivocal and that the language is positive. It, we contend, means that a farmer can secure the relief afforded under subdivision (s) on one of two conditions. One: If he fails to secure an agreement with his creditors; and, two: If he feels aggrieved by a plan acceptable to

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[1]Pertinent section of Act set forth in Appendix A.

creditors, but which has not, as yet, been confirmed. This creditor, your petitioner, has made a very diligent and comprehensive search of the authorities and has been unable to locate a single reported case directly on this point. This Court, speaking through Mr. Chief Justice Hughes, has declared:

> "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to *seek* an agreement with their creditors (subsections (a) to (r)) and, *failing this,* to ask for the other relief afforded by subsection (s)." (Italics added.)
>
> *Bartels v. John Hancock Ins. Co.,* 304 U. S. 180, 184.

It is respectfully urged that this Court in the above matter very definitely interpreted the act in such a manner as to warrant the conclusion that once there is a confirmation, there cannot be an amendment under (s). Once an election is made of the alternative remedies provided by Section 75, that constitutes the full relief to be afforded. Where the language of a statute is plain and unambiguous, it is the duty of the Court to enforce it according to its obvious meaning. There should be no attempt to change it by adopting a different construction, for then, there is no room for construction.

Palmer v. Massachusetts, 308 U. S. 79;
Wallace v. Cutten, 298 U. S. 229;
Bate v. Sulxberger, 157 U. S. 1;
Andrews v. St. Louis Joint Stock Bank, 107 Fed. (2d) 462; cert. den. 60 S. Ct. 592, 60 S. Ct. 711;
Sutherland, Statutory Construction, Secs. 364-366.

Congress will be presumed to have used language in a statute in its usual significance and in accordance with common understanding and the ordinary meaning. And, this Court has further held that a bankruptcy court cannot, because of its own notions of equitable principles, refuse to act in accordance with the relief mandated by Congress. Bankruptcy is a part of equity and must be enforced in accord with the general equity doctrines.

S. E. C. v. U. S. Realty & Improvement Co., 60 S. Ct. 1044, 1053, 1054.

The Court below in its opinion [R. 101] declares that the word "aggrieved" in the statute must have undoubtedly been used in its legal sense, *i. e.*, one aggrieved by an order made or action taken. We respectfully contend that the lower Court agrees with our contention that one cannot claim to be "aggrieved" by that which he, himself, elects to do, but that it declined to confine that contention to its proper limitations, and, included the word "order" which destroys the logic of their position. We concede that a debtor can be aggrieved by action taken, *e. g.*, approval of a composition plan by creditors, but we cannot conceive that it was the intention of Congress to permit a debtor to override a Court's confirmation. Moreover, by using the reasoning employed by the lower Court later in the decision, we could say that the Act does not say that which the Court infers. The argument of the lower Court falls under its own weight. A careful check of the Congressional Record for the 73rd and 74th Sessions of Congress reveals nothing that would cross our position. One of the authors of the law stated "* * * the maximum time given him (meaning farmer-debtor 'added') to pay the debt is three years. * * *." Representative Lemke,

co-sponsor of Bill, 79 Congressional Record, Part 13, page 14,331. Also, see, Senate Report No. 985, 74th Congress, May 13, 1935, which reinforces our contention. Particularly, at page 3, thereof, where it is reported "* * * The opening paragraph of subsection (s) provides that if a farmer fails to obtain a composition or extension, *or if he feels aggrieved by the composition or extension proposal,* he may amend his petition or answer, asking to be adjudged a bankrupt. * * *." (Italics added.) The lower Court in passing [R. 103] upon the above report failed to recognize that the above quotation was taken from the Senate Judiciary Committee Report on amending Section 75 and which indicated that great care was taken in the selection of the phraseology due to conflicts arising from the first farmer-debtor law (47 Stat. 1467; 48 Stat. 1289). If we carry the lower Court's definition of the word "aggrieved" to its logical conclusion, it would lead to absurd results. If their contention is correct, it would be possible for a debtor to have a composition and extension plan for a period of 10 years confirmed by the Court; modified; and then, after operating under the plan for nine years and six months, the debtor may then amend under (s) and secure a further three year extension. This Court in the case of *Haggar v. Helvering,* 308 U. S. 389, said at page 394:

> "* * * all statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with the words and with the legislative purpose."

If it were the intention of Congress to provide for amendment even though a plan be confirmed, then why was

provision made for modification (sub. (l)). Congress, we submit, had the foresight to consider that a confirmed plan might require changes after being tried out and so provided the means. The lower Court argues that the relief provided in sub. (1) is discretionary with the Court and may not be sufficient. However, it is for Congress to provide the remedy further if that were deemed necessary or constitutionally permissible. This they did not do nor did they intend to do as is evidenced by the report of the Senate Judiciary Committee *(supra)*. It is unreasonable to presume that Congress intended a farmer-debtor to have the right to present a composition or extension plan to his creditors for their approval; have it confirmed; operate under it for almost three years; and, then, to have the right to amend and secure another three years. Arbitrary laws have no place in a democracy. A creditor must not be subjected to irreparable injury by an unreasonable suspension of his remedies and to do so is in violation of the 5th Amendment.

Louisville v. Radford, 295 U. S. 555;

Continental Illinois Bank v. Chicago Ry., 294 U. S. 648.

A seven-year suspension of remedies is arbitrary and unconscionable. Granting of the same relief twice by means of legal artifices is unreasonable.

Wright v. Logan, No. 7368, Circuit Court of Appeals (7th Cir.), March 15, 1941.

Subdivision (s) provides that the farmer-debtor be adjudicated a bankrupt. Paragraph 3 of subdivision (s) provides that if the debtor redeems the property after a

sale at public auction, he may apply for a discharge. Paragraph 5 of subdivision (s) provides that "a previous discharge of the debtor, under any other section of this title shall not be grounds for denying him the benefit of this section". Paragraph 5 does not refer to compositions or extensions for there is no adjudication requiring a discharge. Congress must have taken this into consideration in enacting Title II, Section 32, sub. C of United States Code, relating to discharges for it provided:

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) * * * (5) has within six years prior to the bankruptcy been granted a discharge or had a composition or an arrangement by way of composition, confirmed under this title or (6). * * *"

The foregoing statute was amended to read as above by the Chandler Act (June 22, 1935). The re-enactment of sub. (s) was in August, 1935. Discharge is a substantive right and is not merely procedure. Being substantive, subsequent amendments cannot operate retroactively. We submit, therefore, once a plan of composition and/or extension is confirmed, it is improper to allow an amendment under subdivision (s) because otherwise the very provisions militate against and nullify one another and the relief under subdivision (s) would be but a sham; as the creditors would immediately go after the debtor's property upon the expiration of the statutory period for a discharge would be impossible and subdivision (s) would degenerate into a mere moratorium statute inimical to federal legislation.

Home Bldg. & Loan v. Blaisdell, 290 U. S. 398.

II.

A Farmer-Debtor Who Has Secured a Confirmation of a Composition and/or Extension Plan and Is "Aggrieved" by It Must Amend Under Subdivision (s) Within a Reasonable Time; an Amendment Filed 33 Months After Date and But 3 Months Before Date of Expiration of Plan Was Not Filed Within a Reasonable Time; One Who Accepts Benefits of Composition and/or Extension Plan for 33 Months and Who Repeatedly During That 33-Month Period Proclaimed That Plan as Confirmed, and, as Modified, Provided Financial Rehabilitation Is Estopped From Being "Aggrieved".

Although we firmly believe that the District Court has no jurisdiction to allow an amendment once a plan is confirmed, *supra,* still, for the purpose of this discussion, let us assume that an amendment under subdivision (s) is proper after confirmation of a plan under subdivisions (a) to (r). In our situation, with the foregoing hypothesis as a basis, we submit that the District Court was without jurisdiction because the amendment was not made within a reasonable time after confirmation.

> *Wright v. Logan,* Circuit Court of Appeals, 7th Circuit, No. 7368, March 15, 1941. (Conflicts with lower Court and supports our contention.)

It is elemental in the law of statutory construction that when a statute does not set forth a time within which an act allowed therein may be done, a reasonable time is presumed to be allowed to do same. (*Sutherland on Statutory Construction,* Second Edition, and innumerable cases cited therein.) In the matter under appeal there was a plan [R. 13] in operation since September 27, 1937; that this confirmed plan [R. 24] was modified in September, 1939

[R. 45], and, when the debtors were unable to meet the terms of said modification [R. 48, 66] this creditor moved to set aside the restraining orders [R. 48] and petitioned for leave to sell [R. 66], incorporating in said two motions the fact that debtors were unable to comply with plan, as amended, and were not securing financial rehabilitation and that the plan had but three months to continue, being 33 months old. These motions were filed on July 2, 1940 [R. 51, 68], and were noticed for hearing on July 8, 1940. On July 5, 1940, these debtors filed their amended petitions [R. 52, 56], together with the recommendations of the Conciliation Commissioner in which said Commissioner declared: "It further appearing that said debtor has substantially carried out his commitments under said plan, as amended, and that said debtor has now stated under oath that he feels himself aggrieved by said composition and extension as so amended, * * *" [R. 55, 59]. Thereafter, this creditor filed the notice of motion to dismiss [R. 69] and the notice of motion to set aside the order permitting debtors to amend, etc. [R. 70]. In the latter motion, and affidavit in support thereof, this creditor charged that the recommendations of the Commissioner were false and untrue for the reason that there had not been a "substantial compliance," outlining in the affidavit that *debtors had failed to pay taxes, interest, principal sums due and operation expenses.* These were also set forth in the restraining order secured to prevent the debtors from proceeding under subdivision (s) [R. 73]. At no time was there a denial of the charges set forth by this creditor. The record before this Court is complete. Never did the debtors or Conciliation Commissioner file counter-affidavits or offer proof to the contrary. There-

fore, it was incumbent upon the lower Court to accept our affidavits as conclusive in the hearing on the motions. The reports of the Conciliation Commissioner were false and untrue within the meaning of those terms in the law appertaining to bankruptcy. The word "false" means more than erroneous or untrue and imports an intention to deceive, and a materially false statement in writing knowingly or intentionally untrue will bar a discharge.

The bankrupt's unsupported assertions of an honest intent will not overcome the natural inference from admitted facts. (*Matter of Rosenfield,* 1 Fed. Supp. 924; *Matter of Adams,* 44 Fed. (2d) 670.) We contend that the false and untrue recommendations of the Commissioner were either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently. (*Third National Bank v. Schatten,* 81 Fed. (2d) 538.) In view of the fact that the lower Court will not pass upon a plea for amendment unless accompanied by the recommendations of the Commissioner, the report of the Commissioner is binding upon the debtor, and any statements knowingly false or made with such recklessness as to constitute a fraud, should be held against the debtor who furnishes said information to the Commissioner. It might be added that the practice in this district is to have the farmer keep the books and make reports, when, and if requested, to the Commissioner. We respectfully submit that it was an abuse of discretion to accept the report of the Commissioner when shown to be false and untrue.

Bouvier's Law Dictionary, Unabridged Edition, defines aggrieved as: "Having a grievance or suffered loss or injury." Funk and Wagnall's New Standard Dictionary (1940), defines aggrieved as: "Subjected to ill-treatment;

made to feel injury or injustice." It is submitted, that a construction of a statute that would enable a debtor to claim to be "aggrieved", in view of the foregoing definitions 33 months after a plan is in operation is a self-contradictory interpretation.

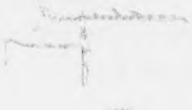
Finally, we refer to General Order in Bankruptcy No. 50, sub. 4, which requires a debtor under Section 75, subdivisions (a) to (r), to make an application for confirmation of a composition and/or extension plan within 90 days or suffer a dismissal of his petition. This order refers to a matter on which Congress was silent. We may validly argue that if this Court believed that a debtor might amend after confirmation of a plan under subdivisions (a) to (r), it would have set forth a time limit on that, also, By its avoidance, we conclude that the provisions of subdivision (s) relating to amendment are sufficiently clear and prohibit an amendment after confirmation of a plan under subdivisions (a) to (r); if an amendment is permissible, it still must come within the general rule of a reasonable time, an allowance of amendment, otherwise, being an abuse of discretion.

It is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action.

April 22, 1941.

BURNETT WOLFSON,
Counsel for Petitioner.

JOHN P. TOBIN,
Of Counsel.



APPENDIX A.

Section 75 (s) of Bankruptcy Act (11 U.S.C.A., Sec. 203 (s)):

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his answer, asking to be adjudged a bankrupt. * * *."

MAY 29 1941
CHARLES ELMORE CROPLEY
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 982

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLAN J. CARTER,
205 First National Bank Bldg., Pomona, Calif.
Counsel for Respondents.

A. L. HICKSON,
Of Counsel.

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 (R. 98-103) and is not yet reported in the Federal Reporter. A previous opinion on a former appeal rendered June 7, 1940, is reported in 112 Fed. (2d) 967.

STATUTES INVOLVED

The statute involved in this case is Section 75 of the Bankruptcy Act, as amended, subsections (a) to (s); 11 U. S. C. A. 203 (a) to (s).

STATEMENT OF THE CASE

(Throughout this Statement and Brief Petitioner Cohan and his predecessor in title, Creditor Feldman, will be referred to as petitioner, and the respondents as debtors.)

Petitioner here seeks to have this Court take jurisdiction and reverse the action of the Circuit Court of Appeals of the 9th Circuit. That Court has affirmed the action of the District Court for the Southern District of California in refusing to set aside an adjudication of debtors as bankrupts under subsection (s) of Section 75 of the Bankruptcy Act.

In 1931 debtors purchased a 20 acre citrus grove from petitioner for $52,500.00 (R. 3-4). In the next succeeding six years they paid all obligations against the grove except a note secured by a second trust deed now back in petitioner's hands amounting to $21,147.00 principal and interest (R. 4, 23).

In January, 1937, debtors had arranged refinancing to pay off petitioner's note (R. 5), when a freeze occurred destroying the entire crop of lemons on 17 acres of this grove (R. 5). Petitioner then took steps to foreclose (R. 10).

A proceeding for moratorium relief in the State Court was dismissed on a technical jurisdictional point without passing on the merits (R. 20). Thereupon two companion petitions were filed for relief under Section 75 in the District Court on July 13, 1937 (R. 18, 21).

A second amended extension proposal was approved by a majority in number and amount of debtors' creditors on September 30, 1937 (R. 21) and confirmation recommended to the District Court (R. 22). On November 15, 1937, Hon. Harry A. Hollzer, District Judge, heard the application for confirmation (R. 20). The proposal was confirmed by the Court on May 24, 1938 (R. 24).

In September, 1939, following extensive hearings in April and May, 1939, Judge Hollzer denied petitioner's application to dismiss, and modified the plan by postponing certain principal payments and reducing interest to all creditors to 3½% (R. 45). On appeal this action was affirmed by the Circuit Court of Appeals on June 7, 1940, 112 Fed. (2d) 967.

On July 2, 1940, petitioner filed motions for leave to sell (R. 66) and to vacate restraining orders (R. 48). Debtors' applications for leave to amend and be declared bankrupts under subsection (s) were filed July 5, 1940, (R. 52, 56) accompanied by the recommendations of the Conciliation Commissioner that such adjudications be made (R. 54, 58). Adjudications were entered that same day (R. 60, 61). On July 11, 1940, petitioner moved to set aside these ajudications (R. 70). That motion was heard July 15, 1940, (R. 75), and denied August 6, 1940 (R. 78). The appeal to the Circuit Court of Appeals followed.

On page 8 of the petition reference is made to the fact that at the hearing on July 15, 1940, petitioner "was

permitted (R. 77) to present the testimony of two appraisers out of order for the purpose of saving this creditor additional appearance fees." After naming these appraisers, petitioner goes on to assert that they "each testified that the value of the lemon grove * * * was under $20,000.00, same being under our lien amount." The record (R. 77) does not even disclose that these two witnesses were appraisers and gives us no indication as to what their testimony was. Since counsel have gone outside the record on this point, we think it fair to state that following the appeal to the Circuit Court of Appeals, Conciliation Commissioner C. P. Von Herzen proceeded to have an appraisal made of the lemon grove and of the other assets of the bankrupts as a part of the regular procedure under subsection (s), and that such appraisal, filed December 5, 1940, fixed the value of the lemon grove at $31,000.00.

Also on page 8 of the petition counsel asserts "all of the record presented in the District Court on the matter is now before the Court." We consider this assertion very misleading. While no parole evidence was offered by either side, we, as counsel for debtors, did present in detail facts which were accepted by the trial court as true, establishing that the position of the farmer-debtors had been materially improved. One such fact was that Mr. T. B. Freeland, a creditor named in the schedules and an uncle of Charles Elder, one of the debtors, had died in May, 1940, leaving a will under which debtors' two notes and all interest thereon, amounting to more than $9,000.00, were forgiven and

cancelled. The second fact so disclosed to the trial court was that the father of Mrs. Elder, D. C. Crookshank, had died in the same month of May, 1940, and that upon her father's death Mrs. Elder became the life beneficiary under a trust of 50 acres of unmortgaged citrus property. These facts were deemed material as to the debtors' ability to rehabilitate themselves during the stay of proceedings under subsection (s).

The record on this appeal and the record on the earlier appeal between the same parties, establish that from the time of the big freeze in January, 1937, petitioner and his predecessor in title have constantly made every move they could to harrass these debtors and to prevent the orderly procedure under Section 75 of the Bankruptcy Act.

ARGUMENT

I

SUBSECTION (s) OF SECTION 75 OF THE BANKRUPTCY ACT GRANTS TO EVERY FARMER-DEBTOR THE RIGHT TO AMEND HIS PETITION ASKING TO BE ADJUDGED A BANKRUPT IF HE FEELS AGGRIEVED BY ANY EXTENSION PLAN, AND THERE IS NO LIMITATION REQUIRING THIS TO BE DONE BEFORE THE PLAN IS CONFIRMED.

The language of subsection (s) is very broad. The portion here to be considered by the Court reads:

> "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors

whose claims are affected by a composition and/or extension proposal, *or if he feels aggrieved by the composition and/or extension, may amend his petition* or answer, *asking to be adjudged a bankrupt.*" (emphasis ours)

As pointed out by Mr. Justice Healy in the opinion of the Circuit Court of Appeals, the above quoted language of the Statute extends to these debtors as of right the relief given them by the District Court.

Petitioner argues that once a farmer-debtor has secured the approval of a majority in number and amount of his creditors to a plan proposed by him, and such plan has been confirmed by the Court, he cannot thereafter claim to be aggrieved under the language above quoted from subsection (s).

The Statute, however, does not say that; in fact, it says the very opposite. It clearly contemplates that a debtor may be aggrieved by a plan and there are no limitations of any kind on when he can file such an amended petition.

Counsel for petitioner argues (page 20 of the petition for certiorari) that the relief can be afforded only if the farmer "fails to secure an agreement with his creditors" or "if he feels aggrieved by a plan acceptable to creditors *but which has not as yet been confirmed.*" (Emphasis ours) The italicized portion has no foundation in the language of the Statute itself.

Counsel quotes from the language of Mr. Chief Justice Hughes in the case of *Bartels* v. *John Hancock*

Insurance Co., 304 U. S. 180 at 184 where this Court said:

> "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections [a] to [r]) and, failing this, to ask for the other relief afforded by subsection (s)."

Petitioner insists that this Court in the above language interpreted the Act in such a manner as to warrant the conclusion that once there is a confirmation there cannot be an amendment under subsection (s). It will be noted that confirmation was not mentioned in the language of this Court. It is further apparent that the Court was talking about the two ordinary alternatives which arise, namely, an agreement under (a) to (r), or, failing such an agreement, relief under subsection (s). This Court did not there have before it any necessity of construing the language as to a farmer-debtor feeling "aggrieved by the composition and/or extension." To interpret the language of this Court in the *Bartels Case* as covering every possible contingency, would render that portion of subsection (s) relating to a farmer feeling aggrieved by a plan absolutely meaningless. We respectfully submit that Mr. Justice Healy is correct in referring to the *Bartels Case* as sustaining the result reached in this case by the District Court.

Let us apply to the present case counsel's test that confirmation of a plan is the act which cuts off the

rights of a farmer-debtor to seek relief under (s). The plan was dated September 27, 1937, (R. 21) but it was not confirmed by Judge Hollzer until May 24, 1938. (R. 24). This would mean that on May 23, 1938, debtors could properly ask to go under (s) but that on May 25, 1938 they could not. This would seem to be a wholly unreasonable result.

We join counsel for petitioner in their statement (petitioner's Brief p. 21) that there is no reported case directly covering this point. However, there is a decision by Hon. Leon Yankwich, District Judge, rendered in this Southern District of California, Central Division, in a case entitled: *In the Matter of James Perry Glass,* No. 4096 of the files in the District Court. That case was referred to by us in briefs filed with the District Court and with the Circuit Court of Appeals.

Those court files and records show that James Perry Glass, a resident of Fresno County, California, filed his petition under Section 75 on November 6, 1935. His petition was ordered approved on the same day and a reference made to Conciliation Commissioner Walls. On April 13, 1936, a petition for composition and extension was filed and on August 6, 1936, Judge Stephens entered an order to show cause why this petition should not be confirmed. On August 12, 1936, the plan was approved and confirmed.

On January 31, 1939, Mr. Glass petitioned to be adjudicated a bankrupt under subsection (s). In his petition he alleged, among other things, "that petitioner

feels aggrieved and is aggrieved by the composition and extension agreement made and entered into between petitioner and his creditors." On February 25, 1939, John Preston King, Conciliation Commissioner, filed his report recommending adjudication under subsection (s). On February 27, 1939, an order was entered by the late Hon. William P. James, of the District Court, adjudicating Glass a bankrupt under subsection (s).

On April 18, 1939, an eight-page petition to set aside the adjudication under (s) was filed by one of the creditors, and a notice of such petition and an affidavit of mailing. On May 3, 1939, the moving creditor, by leave of Court, filed points and authorities.

On May 4, 1939, the farmer-debtor, Glass, filed his affidavit supporting the adjudication under (s) *in which he asserted that the creditor in question had done everything in his power to oppose and defeat the plan.* (Emphasis ours).

On May 5, 1939, Judge Yankwich entered a minute order denying the petition to set aside the order of adjudicating under (s) and that adjudication continued to stand.

Here, then, was a plan similar to the one now before the Court which had been advanced by the farmer, approved by a majority of creditors and confirmed by the Court. Moreover, on January 31, 1939, when Mr. Glass filed his amended petition to go under (s), his plan had

less than 2½ months still to run because it had been dated and filed April 13, 1936.

This decision of Judge Yankwich as to a case practically identical with our own, is highly persuasive. More important to us, however, is the fact that it was binding on Conciliation Commissioner Von Herzen and was considered by him to be controlling when he recommended an adjudication to go under (s) in the present case. In the light of these facts we submit that the charges contained at page 28 of Petitioner's Brief that the Commissioner acted fraudulently are entirely unjustified and not borne out by the record. Similar charges were made in the two courts below and were disregarded as untrue. It is to be regretted that a Conciliation Commissioner should be subject to such an unwarranted attack.

Petitioner quotes from Representative Lemke, cosponsor of the bill, that the maximum time given the farmer-debtor to pay his debts is three years (Petitioner's Brief p. 22). There can be no dispute that the protection of subsection (s) does grant a three year stay, but to argue from that that the benefits of the Act were limited to three years is absurd.

Negotiations toward the agreement of creditors and debtor as to a plan often take as long as a year before either an agreement is reached, or, on a failure to agree, a petition to go under (s). If there is an agreement there is no limitation whatever on the time that such an

agreement can cover; it may be six months; it may be three years; it may be five years or longer.

A relevant example is found in the case of *Borchard* v. *California Bank,* 310 U. S. 311, decided by this Court May 20, 1940. Borchard filed his original petition under subsection (s) in May, 1935. In June, 1935, the case was dismissed and reinstated in September, 1935, after the 1935 amendment. In October, 1935, Borchard asked for an appraisal. Shortly thereafter the creditor bank asked to have the proceeding dismissed. This motion was denied. Stipulations were thereafter entered into whereby the proceeds of the crops were expended for the cultivation and improving of the land. On May 24, 1938, debtors again asked for appraisal and an appraisal was made. On November 10, 1938, the bank moved to dismiss the case. The trial court granted the dismissal which was affirmed by the Circuit Court of Appeals but reversed by this court.

The effect of this Court's decision was to give an additional stay of three years, which made eight and a half years after the filing of Borchard's original petition to go under (s) and seven and a half years after the reinstatement of that application.

We agree with counsel for petitioner that "where the language of a Statute is plain and unambiguous, it is the duty of the Court to enforce it according to its obvious meaning (Petitioner's Brief p. 21). We disagree, however, with counsel's conclusions in that we

believe the plain and unambiguous language of Section 75, here under consideration, permitted the debtors to be adjudicated under subsection (s).

Even if there were any ambiguities in that portion of subsection (s), here under consideration, such ambiguities must be resolved in favor of the debtors and the act liberally construed to give the debtors the full measure of relief afforded by Congress. *Wright* v. *Union Central Life Insurance Co.,* 85 L. Ed. 166.

Counsel for petitioner relies on the recent case of *Wright* v. *Logan,* No. 7368, Circuit Court of Appeals (7th Cir.) decided March 15, 1941 (Com. Cl. House, Par. 53,087, Page 53,155); (Petition for Certiorari, P. 24). That case involved a situation where foreclosure had already taken place and is to be distinguished from the present case on that ground. To the extent, if any, that it can be said to be applicable here, we think it is in direct conflict with this Court's holding in *Borchard* v. *California Bank,* 310 U. S. 311, supra.

Petitioner urges (Petition P. 25) that the prohibition against granting a discharge, contained in 11, U. S. C. A. Sec. 32, subsection c. (5) operates to prevent the farmer resorting to subsection (s) after the composition or extension plan has been confirmed. Paragraph 5 of subsection (s) of Section 75 of the Act provides that "previous discharge of the debtor under any other section of this title shall not be ground for denying him the benefits of this section." The fact that Section 32, subdivision c. (5) was enacted in 1938 as a

part of the Chandler Act, cannot be held to repeal by implication the above quoted proviso in paragraph 5 of subsection s, particularly in view of the provision elsewhere in Section 75 that the general bankruptcy act shall apply to farmer-debtor cases unless otherwise specifically provided for in Section 75 itself.

II

THERE IS NO LIMITATION AS TO THE TIME WITHIN WHICH THE FARMER-DEBTOR MAY FEEL AGGRIEVED AND SEEK ADDITIONAL RELIEF UNDER SUBSECTION (s).

We have pointed out that there are no words of limitation as to when a debtor may consider himself aggrieved by a plan and file an amended petition under (s).

Opposing counsel contends that the words "within a reasonable time" must be read into the Act, thus requiring that the amended petition must be filed within a reasonable time after the plan has been confirmed. The Statute says nothing about a reasonable time. As we pointed out under point I, supra, the Act is to be construed liberally to accord the farmer-debtor the full measure of relief afforded by Congress, *Wright* v. *Union Central Life Insurance Company,* 85 L. Ed. 160. As pointed out by Mr. Justice Healy of the Circuit Court, the situation impelling the farmer-debtor to seek adjudication under subsection (s) may not develop until the plan has been in effect for a substantial time. Such was the case here and such was the case in the

Glass Case, fully described under point I, supra, where a similar result was reached in the same Federal District Court.

Counsel again refers to the case of *Wright* v. *Logan,* Circuit Court of Appeals (7th Circuit) No. 7368, (Com. Cl. House, paragraph 53,087, p. 53,155). It is true that Mr. Justice Sparks, in the opinion in that case, said:

> "Subsection (s) provides that any farmer failing to obtain the acceptance of a majority of his creditors may amend his petition or answer asking to be adjudged a bankrupt. No time is specified within which such application is to be made, but we have construed the Statute to provide that a reasonable time is to be allowed to enable the debtor to affect a composition with his creditors, or, failing that, to apply to the Court for adjudication in bankruptcy."

In that case there had never been any plan approved by creditors or confirmed by the Court and so, strictly speaking, it is not here applicable. Moreover the decision of the Court in the Logan case might be justified as an alleged failure to comply with General Order in Bankruptcy, No. 50, sub. 4, requiring a debtor under (a) to (r) to make application for confirmation within 90 days or suffer a dismissal of his petition.

On pages 27 and 28 of Petitioner's Brief, counsel attempt to establish that the alleged facts recited in the Commissioner's certificates and recommendations of adjudication under (s) were either knowingly false or made so recklessly as to warrant a finding that the Commissioner acted fraudulently.

For the purpose of this Court's consideration of the pending application for certiorari, we respectfully submit that the certificates and recommendations of the Conciliation Commissioner stand as an adjudication of the facts stated in said reports.

As to debtor, Charles Elder, the Commissioner in his report, after stating the jurisdictional facts as to the original filing of the petition, the acceptance and approval of the extension proposal and its later amendment, continued:

> "It further appearing that said debtor has substantially carried out his commitments under said plan, as amended, and that said debtor has now stated under oath that he feels himself aggrieved by said composition and extension as so amended, and
>
> "It further appearing to said Commissioner that under said stated facts said debtor is entitled to file an amended petition under Section 75, subsection (s) of the Bankruptcy Act:
>
> " * * * said Commissioner further recommends that Charles Samuel Elder, debtor herein, be adjudged bankrupt pursuant to provision of subsection (s) of Section 75 of the Bankruptcy Act, as amended" (R. 55).

As against these direct findings of fact, all that there is in the record supporting petitioner's position are allegations on information and belief on the part of petitioner and his attorney, John P. Tobin, that the debtors are unable to pay their current obligations (R. 73, 68, 50, 67, 61).

The direct findings of fact by the Commissioner that the debtors have substantially carried out their commitments under the plan, cannot be overcome by affidavits upon information and belief.

The provisions of Federal Rule 52 (a) seem to apply to this situation. It is provided that

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of the Master, to the extent that the court adopts them, shall be considered as findings of the court."

The assertions on information and belief in the several affidavits cannot overcome the findings of Commissioner Von Herzen, who in this matter has authority equivalent to or greater than that of an ordinary master. This is particulary true since the allegations in the affidavits are incomplete and inconclusive with no showing whatever as to expected receipts of income from the two groves of the farmer-debtors during the near future and as to other pertinent facts within the Commissioner's knowledge at the time he made the findings.

Counsel asserts (Petition and Brief P. 8, 27) that the facts alleged in the petitioner's affidavits were never denied by the debtors or the Conciliation Commissioner.

The Conciliation Commissioner was not on trial. Furthermore, he was in court in response to a sub-

poena as a witness for petitioner (R. 72). Although there in response to such subpoena, he was not asked to testify.

Upon this record we respectfully submit that it is this Court's duty to accept the Commissioner's findings as true, especially where those facts have in effect been adopted by the District Court and the Circuit Court of Appeals in their refusal to set aside the adjudication under (s) made by Judge Cosgrove.

We need hardly emphasize how detrimental to the orderly working of the plan approved by the District Court was the constant litigation and uncertainty resulting from the attitude of petitioner and his predecessor in title throughout the period from September, 1937, to July, 1940. The time and energy which had to be spent by the farmer-debtor and by ourselves, as their counsel, in meeting the almost constant and long, drawn out attacks, as shown by this record, made by petitioner, might, under other circumstances, have been spent in obtaining some refinancing which would have paid off petitioner's obligation.

This constant litigation carried on by this one objecting creditor made refinancing practically impossible to obtain. At least one large creditor, who had talked of such refinancing, was so antagonized by being subpoenaed as a witness by petitioner and criticized for having granted orally an extension of time on a small principal payment that he declined to consider further making such a loan.

The plan called for payments of attorneys' fees to ourselves as attorneys for the farmer-debtors (R. 13), but we have never, up to now, asked the Court for the setting aside of any payments to us in spite of the tremendous amount of time spent in meeting and defeating these constant attacks through a more than three year period. Naturally, we expect to be paid for those services but we have been endeavoring in every way to assist in the debtors' financial rehabilitation first.

We respectfully submit that this Court should deny petitioner's application for certiorari and permit the adjudication under (s) to stand and to proceed in an orderly fashion. The appraisal of the property has been made and proper steps will be taken by the Conciliation Commissioner adequately to protect petitioner's lien.

Respectfully submitted,

ALLAN J. CARTER,
Counsel for Respondents.

A. L. HICKSON,
Of Counsel.